Re: Scorecard alert on H.J. Res. 17 / S.J. Res. 1, purporting to retroactively “remove” deadline on the long-expired, pro-abortion 1972 Equal Rights Amendment

Dear Senator:

Before the end of the current Congress, the Majority Leader may force a cloture vote on a motion to proceed to a measure (H.J. Res. 17) that purports to retroactively “remove” the ratification deadline that the 92nd Congress included in the Equal Rights Amendment Resolution submitted to the states on March 22, 1972 – over 50 years ago.

After H.J. Res. 17 passed the House of Representatives on a near-party-line vote on March 17, 2021, it was held at the desk under Rule 14. The Senate companion, S.J. Res. 1, introduced by Senators Cardin and Murkowski, has been in the Judiciary Committee for 22 months without action; it currently has 52 co-sponsors (every Senate Democrat, plus Senators Murkowski and Collins).

For the reasons summarized below, the National Right to Life Committee, the federation of state right-to-life organizations, urges you to oppose the motion to advance H.J. Res. 17, and will include this roll call in its scorecard of key votes of the 117th Congress.

Leaders of prominent pro-abortion and pro-ERA advocacy groups now openly proclaim that they believe the 1972 ERA should be construed to erect a federal constitutional barrier to virtually any limits on abortion or government funding of abortion. For decades, leading ERA advocates denied that was the case, or deflected such interpretations, but those denials and deflections were merely “a strategic decision,” we are now told (i.e., a deception). The mask has now been discarded. All pro-life senators would be well advised to take the pro-abortion advocacy groups at their current word as to how they intend to employ the vague 1972 language if it somehow ever becomes part of the Constitution.

The 92nd Congress included a seven-year ratification deadline in the ERA Resolution. On March 5, 2021, federal District Judge Rudolph Contreras (an appointee of President Obama) ruled that Congress had the constitutional power to impose such a deadline, that it would have been “absurd” for the Archivist to disregard the deadline, and that legislative actions that occurred in Nevada (2017), Illinois (2018), and Virginia (2020) “came too late to count.” Illinois and Nevada appealed that ruling. Oral arguments were presented to a three-judge panel (Judges Wilkins, Childs, and Rao) on September 28, 2022, and a ruling is expected in the months immediately ahead. As the Washington Post pointed out in a February 9, 2022 fact check, over the past 40 years, “Every time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican.” If H.J. Res. 17 is presented to you during the lame-duck session, it should be seen as a last-minute attempt to muddy the waters and confuse the public before the court of appeals rules. On the ERA, “the rule of law” is not what leading ERA-revivalists are seeking.

H.J. Res. 17 is unconstitutional in at least four different ways.

First, on the ERA, the legitimate constitutional role of Congress in the amendment process ended when it submitted the ERA Resolution to the states on March 22, 1972. As Deputy Assistant Attorney General Sarah Harrington asserted before the D.C. Circuit on September 28, 2022, “The Constitution doesn’t contemplate any role for Congress at the back end. Congress proposes the amendment, it goes out into the world, and the states do what they’re going to do.” H.J. Res. 17 is an exercise in political theater that shows contempt for long-established constitutional requirements.
Second, Article V does not allow Congress to engage in a retroactive “bait-and-switch.” As Judge Contreras observed in his 2021 ruling upholding the deadline, “Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed.” The current Congress lacks power to retroactively edit that legislative compromise, while simultaneously claiming the congressional super-majorities and subsequent state ratifications that flowed from the compromise. Judge Contreras also noted that 30 of the states that ratified the ERA specifically quoted or referred to the deadline in their ratification instruments.

(If Congress actually had bait-and-switch powers, they could as easily be used to undercut an amendment properly submitted to the states, if simple majorities of a later Congress disliked it– for example, by retroactively shortening a deadline in order to head off anticipated ratification, or by retroactively changing the mode of ratification from state legislatures to state conventions mid-way through the ratification process. Such manipulations are incompatible with Article V.)

Third, even if Congress somehow did hold power to execute a retroactive bait-and-switch, the authors of H.J. Res. 17 have formally declared the resolution to be an exercise of Congress’ Article V powers. That means approval would require a two-thirds vote, as is always the case when Congress acts under Article V. This is one of the two grounds on which the only federal court ever to review the purported 1978 “deadline extension” ruled that it was unconstitutional. (Idaho v. Freeman, 1981)

Fourth, even setting aside the specific requirements of Article V, no Congress has power to act on any measure after it has expired. The current Congress can no more act on the long-expired ERA Resolution than it can now override a veto by President Carter. Certainly, Congress has the power to again submit the same proposed amendment text to the states, with or without a ratification deadline, but it must do so by the procedures spelled out in Article V, including the requirement for two-thirds approval by each house, within a single Congress. As the late Justice Ruth Bader Ginsburg said on February 10, 2020:

*I would like to see a new beginning. I’d like it to start over. There’s too much controversy about latecomers -- Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, “We’ve changed our minds”?*

National Right to Life intends to score and weigh heavily any roll call on advancing this manifestly unconstitutional resolution. In our communications with our members, supporters, and affiliates nationwide, any vote to advance the resolution will be accurately characterized as supportive of inserting language into the U.S. Constitution intended to severely jeopardize any limits on abortion, including late abortions, and intended to require government funding of elective abortion. Should you have any questions, please contact us at (202) 378-8863, or via e-mail at jpopik@nrlc.org. Thank you for your consideration of NRLC’s position on this matter.

Respectfully submitted,

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